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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91161603
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Attachments	Opposer's Reply Brief.pdf (8 pages)(373628 bytes) Opposer's Motion to Strike Applicant's Untimely Brief.pdf (6 pages)(304282 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/320,975
Published in the Official Gazette on August 3, 2004

ALLERGAN, INC.,

Opposer,

v.

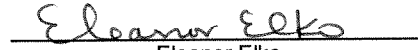
BIOCENTRIC LABORATORIES, INC.

Applicant.

Opposition No. 91161603

CERTIFICATE OF ON-LINE FILING

I hereby certify that on August 24, 2006, this paper was filed on-line with the Trademark Trial and Appeal Board.


Eleanor Elko

OPPOSER'S REPLY BRIEF

Pursuant to Rule 2.128(a)(i), Opposer Allergan, Inc. hereby submits the following reply brief in support of its opposition to registration of the mark at issue in the opposed application.

INTRODUCTION

Having failed to comply with the Trademark Rules of Practice (even its Brief was untimely filed), and having failed to introduce *any* evidence at trial, Applicant BioCentric Laboratories, Inc. (“Applicant”) has been forced to argue from “evidence” that consists of nothing more than unsupported statements of “fact”, evidence that plainly cannot be considered. *See* Opposer’s Motion to Strike Applicant’s Untimely Filed Brief and Improperly Submitted Evidence filed concurrently herewith.¹ Even if that evidence were admitted, it does not in any way detract from the fact that Applicant, with full knowledge of the famous BOTOX[®] mark, consciously chose to adopt a mark that shares the dominant, unique, feature of the BOTOX[®] mark for use on related goods.

Because the uncontroverted record shows that the BOTOX[®] mark is famous – which Applicant now concedes (App. Brief, p. 3 (“BOTOX is famous, everyone knows this”)) – and that consumers of the related goods of record are likely to be confused by the simultaneous registration of the similar marks at issue, this opposition must be sustained.

I. OPPOSER HAS INTRODUCED SUBSTANTIAL EVIDENCE TO SUPPORT ITS POSITION

Applicant spends virtually its entire Brief making statements based on evidence that is not properly before the Board, and does nothing to refute the evidence introduced by Opposer during trial. As set forth in full in Opposer’s Brief, the record consists solely of Opposer’s prior registration of the “BOTOX” mark, the trial depositions of Tom Albright and Rebecca Spaar, and printouts of listings of applications from the TARR website. That record shows that the

¹ Most of the “evidence” cited in Applicant’s Brief originally appeared in Applicant’s May 10, 2006, Submission No. 9, which was withdrawn in the face of Opposer’s June 6, 2006, Motion to Strike. Applicant’s attempt to simply reintroduce its inadmissible evidence in its Brief should not be countenanced.

BOTOX[®] mark is famous,² that Applicant's goods (as defined by Applicant's unrestricted identification of goods) are related to the goods sold under the BOTOX[®] mark, that the goods are marketed to the same class of consumers and travel in the same channels of trade, and that the marks are confusingly similar. As discussed in full in Opposer's Brief, the *evidence* properly introduced by Opposer establishes likelihood of confusion under the standards set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973).

**II. APPLICANT'S ATTEMPT TO INTRODUCE EVIDENCE IN ITS BRIEF
SHOULD BE REJECTED AND, IN ANY EVENT, ITS ARGUMENTS ARE
UNAVAILING**

In its main brief, Opposer accurately described the entirety of the evidence properly made of record during trial. In response, Applicant makes repeated statements, without citation to any evidence, claiming that Opposer's statements are "an out right fabrication." (App. Brief, p. 2). Applicant also makes multiple statements, equally unsupported by any evidence, regarding the goods sold under its mark, the meaning of its mark, and its motivation for choosing its mark. As discussed in the accompanying Motion to Strike, none of this evidence was introduced during trial, none of it is self-authenticating, and none of it is admissible. As a result, none of it should be considered. As a result, Applicant's position must be evaluated only with regard to the

² Applicant appears to now concede that fame, as stated on page 3 of its Brief:

"By the Opposer's own admission that BOTOX is famous, everyone knows this."

Even if this statement is not considered a concession, Opposer's evidence of its long, exclusive use of the BOTOX[®] mark, the revenue it has received, and the advertising that has been used to promote goods under the mark, show that the mark is, indeed, famous. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1371, 63 USPQ2d 1303, 1305-06 (Fed. Cir. 2002). Applicant has not attempted to refute that conclusion.

evidence properly of record, none of which supports Applicant's claim that there is no likelihood of confusion in this matter.

Notwithstanding the inadmissibility of Applicant's evidence, each of its arguments is discussed briefly below.

A. The Goods At Issue Are Related

As discussed in Opposer's Brief, the record reflects that the circumstances surrounding the marketing of the goods at issue are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910, 911 (TTAB 1978). Applicant's unsupported statements regarding the purported nature of its "SEATOX" product are irrelevant given the unrestricted nature of its identification of goods.

Moreover, the record itself contradicts Applicant's argument, is that it reflects that Applicant compares its product to the BOTOX[®] Product. For example, Applicant's fliers state that one of the ingredients in the "SEATOX" product, "Argirelene", acts "without the paralysis as with Botox[®] injections" (Spaar Depo. 45:1-9, 53:8-54:1; Exhs. 29, 30) and the label on Applicant's product states that "SeaTox Triple Complex functions by relaxing the muscles, as opposed to paralyzing them with chemical injections." (Spaar Depo. 61:1-8, 63:2-8; Exhs. 31, 32.) Because Applicant itself is plainly relating its product to the BOTOX[®] Product, the consuming public will find the goods to be related as well.

B. Applicant's Strained Explanation for The "TOX" Portion of Its Mark Must Be Rejected

As discussed in full in Opposer's Brief, Applicant's own documents fail to reflect that the "TOX" portion of its mark has any descriptive or suggestive meaning. (Opp. Brief, pp. 14-15.) Now, Applicant attempts to explain the use of the "TOX" portion of its mark based on dictionary definitions of "detoxify", "free radical", and "antioxidant." That argument is unavailing for several reasons.

First, as previously noted, there is no evidence of record that Applicant went through the thought process reflected in Applicant's Brief at the time it selected its mark. Opposer raised the issue of the purported meaning of Applicant's mark in order to highlight the fact that, *at the time Applicant selected its mark*, it did so with knowledge of the BOTOX[®] mark and in an attempt to trade off the goodwill associated with the mark. Applicant's unsupported explanation should be rejected.

Second, Applicant's explanation contradicts Ms. Spaar's deposition testimony, in which she testified that Applicant's fliers were intended to describe the effect of the ingredients in Applicant's "SEATOX" product, *none* of which speak to some previously unmentioned and purported detoxifying effect of those ingredients. It is not credible that Applicant would have adopted a "TOX"-formative mark because the mark purportedly described an effect of its product, and then fail to mention that effect when actually describing the product to consumers.

Third, Applicant's opposition-inspired explanation is not logical. As set forth in Applicant's definitions, "detoxify" refers to the process of removing "a poison or toxin or the effect of such" or "to free (as a drug user or an alcoholic) from an intoxicating or an addictive substance in the body...." "Free radicals" are not poisons or toxins, they are "a normal

byproduct of oxidation reactions.” Neutralizing them, as Applicant claims the ingredients in its product does, is the process of inhibiting oxidation, not removing toxins. Applicant’s late-filed, unsupported explanation for its mark must be rejected.

C. Applicant’s Awareness Of Marks

Finally, as an apparent further explanation for its selection and adoption of a “TOX”-formative mark, Applicant makes the bold, unsupported, statement that “Applicant was aware of every mark with TOX posted on TESS (Trademark Electronic Search System).” (App. Brief, p. 5). This inadmissible statement is directly contradicted by Applicant’s Interrogatory responses.³ It therefore should not be given any weight.

III. CONCLUSION

Because Opposer’s BOTOX[®] mark was famous at the time Applicant adopted the mark at issue, it was required to stay far away from the shadow of Opposer’s mark. Applicant did not. As a result, and based on the foregoing, the evidence properly of record, and the arguments set forth in full in Opposer’s Brief, Opposer respectfully requests that the Board find that the Applicant’s mark is confusingly similar to Opposer’s previously registered, used and famous

³ See, e.g., Applicant’s Response to Interrogatory No. 7:

“Interrogatory: Describe all efforts undertaken by or on behalf of Applicant to determine the nature, extent, and duration of any actual use in commerce or existence of marks, other than Opposer’s Mark, containing a “TOX” suffix.

Response: None.

Supplemental Response: There were no efforts undertaken by or on behalf of Applicant to determine the nature, extent, and duration of any actual use in commerce or existence of marks, including the Opposer’s Mark, containing a “TOX” suffix.”

BOTOX[®] mark, sustain this opposition, and refuse registration to Applicant of the mark shown in the opposed application.

Respectfully submitted,

SEYFARTH SHAW LLP

Dated: August 24, 2006

By: _____



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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2006, I served the foregoing Opposer's Reply Brief on the applicant by depositing a true copy thereof in a sealed envelope with the United States Postal Service "Priority Mail Service" addressed to applicant as follows:

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AND

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Eleanor Elko

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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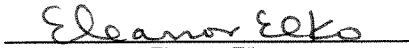
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OPPOSER'S MOTION TO STRIKE

APPLICANT'S UNTIMELY BRIEF AND IMPROPERLY SUBMITTED EVIDENCE,

AND BRIEF IN SUPPORT THEREOF

INTRODUCTION

The Brief filed by Applicant BioCentric Laboratories, Inc. (“Applicant”) was filed after its due date, and therefore should be stricken in its entirety and given no consideration.

Even if considered, Applicant’s Brief makes reference to and relies upon information that Applicant did not properly make part of the record herein during its testimony period. Such proposed evidence includes (1) all factual statements that purport to deny or explain what the evidence of record states, (2) all references to Applicant’s purported knowledge that is not reflected in the record, and (3) all references to and supposition regarding the supposed use of trademarks by third parties.

Because none of this evidence is properly before the Board, Opposer Allergan, Inc. (“Opposer”) moves that Applicant’s proposed evidence be stricken pursuant to Rule 2.123(l) of the Trademark Rules of Practice, and that this Board give no consideration to such evidence at the final hearing of this proceeding.

ARGUMENT

I. APPLICANT’S BRIEF IS UNTIMELY, AND SHOULD BE STRICKEN

37 C.F.R. § 2.128(a)(1) states that the Applicant’s brief “shall be due not later than thirty days after the due date of the first brief.” Opposer’s Brief was due on July 10, 2006,¹ and therefore Applicant’s Brief was due on August 9, 2006. It was not filed until the next day, and therefore should be stricken. Applicant has been reminded by the Board that compliance with the applicable rules and laws would be expected whether or not Applicant was represented by counsel. *See, e.g.*, March 10, 2005 Order. There therefore was no excuse for Applicant’s non-compliance, and Applicant’s Brief should be stricken in its entirety.

¹ Pursuant to the Board’s September 20, 2005 Order, the deadline for filing Opposer’s Brief was July 9, 2006, a Sunday. *See* 37 C.F.R. § 1.7. As a result, although Opposer was allowed to file its Brief the next business day, Applicant’s Brief was actually due to be filed on August 8, 2006.

**II. APPLICANT’S REFERENCES TO EVIDENCE NOT PROPERLY
INTRODUCED AS PART OF THE RECORD DURING THE TESTIMONY
PERIOD, AND THE EVIDENCE ITSELF, MUST BE STRICKEN.**

Even if Applicant’s Brief is considered, “[t]he introduction of evidence in *inter partes* proceedings before the Board is governed by the Federal Rules of Evidence, the relevant portions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and the rules of practice in trademark cases....” TBMP § 702. The procedures for introducing evidence are set forth in several of the Trademark Rules of Practice. *See, e.g.*, 37 C.F.R. §§ 2.120(j), 2.122, 2.123, 2.124(f), 2.125. In short, any evidence upon which a party seeks to rely at the final hearing must be submitted during its trial testimony period. In this case, Applicant did not file any evidence during its trial testimony period, but instead has sought to introduce and discuss such evidence in its Brief.² That evidence consists of a series of statements made in its Brief, without a single citation to supporting evidence. It should not be considered. 37 C.F.R. § 2.123(l) (“Evidence not obtained and filed in compliance with these sections will not be considered”); *Angelica Corp. v. Collins & Aikman Corp.*, 192 USPQ 387, 391 n.10 (TTAB 1976) (“Evidence submitted by [party] for the first time with its brief has not been considered because it was not regularly made of record during its testimony period...”).³

² Applicant originally attempted to introduce evidence in its May 10, 2006, Submission No. 9, which was affirmatively withdrawn by Applicant in the face of Opposer’s June 6, 2006, Motion to Strike. Applicant’s attempt to simply reintroduce its inadmissible evidence in its Brief should not be countenanced.

³ Applicant’s purported evidence is also vulnerable to a plethora of objections under the Federal Rules of Evidence, including the fact that much of it is hearsay and none of it is self-authenticating. Because Applicant did not even cross the initial hurdle of introducing its evidence in a manner where it can properly be considered, Opposer does not believe it is necessary or appropriate to present a lengthy list of evidentiary objections to each item of Applicant’s evidence. To the extent the Board believes any of the evidence discussed herein was properly introduced, Opposer reserves its right to object specifically to that evidence.

Turning to the specific evidence at issue, “[f]actual statements made in a party’s brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial.” TBMP § 704.06(b). Moreover, “[s]tatements in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest.” *Id*; *Abbott Labs. v. Tac Indus., Inc.*, 217 USPQ 819, 822 (TTAB 1981) (statements regarding certain scientific matters which cannot be deemed to be “public knowledge” are not susceptible to judicial notice and cannot be considered). Here, Applicant’s various statements regarding the Applicant’s sales of goods (App. Brief, p. 2), the nature of the product sold under Opposer’s “BOTOX” mark (App. Brief, p. 3), Applicant’s attempt to discuss the purported effects of ingredients in its “SEATOX” product to the extent that discussion is not supported by the record (App. Brief, p. 4),⁴ and the marks cited in its Brief and its view of the number of “trademarks using TOX” (App. Brief, p. 5-6).⁵

The evidence submitted by Applicant in its brief, evidence that was never produced during the proceeding let alone properly introduced during trial, should not be considered, and neither should Applicant’s arguments based on that evidence.

⁴ Although Applicant has not sought leave to introduce the dictionary definitions attached to its Brief, Opposer does not object to their introduction. *See* Opp. Brief, p. 16, n.14. Opposer does object, however, to the unsupported factual statements Applicant makes during its discussion of those definitions.

⁵ While Opposer made of record certain searches from the TARR website (Opposer’s Notice of Reliance Exhs. 1-33), it presented those for the limited purpose of showing the meaning of the “TOX” suffix in cosmetics marks, but did not present evidence of the use of those marks. *See Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (while third-party registrations are entitled to little weight on the question of likelihood of confusion where there is no evidence of actual use, they may be given some weight to show the meaning of a mark in the same way that dictionaries are used). Applicant has not presented any evidence that any of the marks it has cited have been used, and to the extent any of the cited marks, or the purported number of registrations, are not supported by Opposer’s evidence, any reference to them should be stricken.

CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board strike Applicant's Brief in its entirety as untimely. In the alternative, Opposer requests that the Board strike the evidence improperly submitted by Applicant in its brief, and that that evidence and Applicant's related arguments not be considered in the determination of this proceeding.

Dated: August 24, 2006

SEYFARTH SHAW LLP

By: _____



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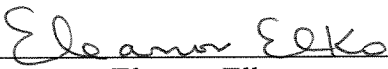
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I hereby certify that on August 24, 2006, I served the foregoing Opposer's Motion To Strike Applicant's Untimely Brief And Improperly Submitted Evidence, And Brief In Support Thereof on the applicant by depositing a true copy thereof in a sealed envelope with the United States Postal Service "Priority Mail Service" addressed to applicant as follows:

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